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No. 02-1305

IN THE
Supreme Court of the United States

CAREY D. EBERT, AS TRUSTEE IN BANKRUPTCY FOR GRAVITY, INC., AND MARK H. DICKSON,
Petitioners,

v.

MICROSOFT CORPORATION, COMPAQ COMPUTER CORPORATION, DELL COMPUTER CORPORATION, AND PB ELECTRONICS, INC. (F/K/A PACKARD BELL NEC, INC.),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

R. STEPHEN BERRY
J. DANIEL LEFTWICH
GREGORY BARUCH
BERRY & LEFTWICH
1717 Pennsylvania Ave., N.W.
Suite 450
Washington, D.C. 20006
(202) 296-3020

NELSON ROACH
NIX, PATTERSON & ROACH
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
STEVEN F. BENZ
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

April 21, 2003

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REPLY BRIEF FOR PETITIONERS

The decision below creates multiple conflicts with decisions of this Court and other circuits on each of the three inter-related questions presented. The panel majority's unprecedented and dangerous legal standards effectively immunize a broad antitrust conspiracy between Microsoft and its three biggest distributors. The decision both "increases the likelihood of future anticompetitive conduct" and "creates a strong disincentive to innovate" for upstart software makers seeking to compete with Microsoft. Dissent, Pet. App. 45a. That result, if not corrected, will harm millions of consumers not only in this case and in the software industry, but in all future cases arising in the Fourth Circuit concerning any industry where a major supplier organizes a broad conspiracy with its major distributors to suppress the supplier's competition.

I. THE PANEL MAJORITY'S HUB-AND-SPOKE HOLDING CONFLICTS WITH PRECEDENT FROM THIS COURT AND OTHER CIRCUITS

Gravity alleged that each OEM defendant executed its anticompetitive agreement with Microsoft knowing that the scheme engineered by Microsoft was broader than any one agreement with a single OEM. Under standards set out by the Sixth and Eighth Circuits, such a hub-and-spoke conspiracy is actionable. *See* Pet. 12-14. Likewise, Gravity's hub-and-spoke allegations are fully in line with this Court's controlling antitrust conspiracy precedents. *See* Pet. 14-16; *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

Strikingly, the OEM defendants – like the panel majority – completely ignore the latter two conflicts, which is powerful evidence that they are irreconcilable. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 n.3 (2001) ("this oversight is particularly incredible because the [panel] majority's attention was directed to [a controlling precedent] at every turn"); Dissent, Pet. App. 34a-35a (faulting majority for not following *Masonite* and *Inter-*

state Circuit). Similarly, Respondents (again, like the panel majority) fail to address the irreconcilable conflict created by the panel's majority's turning a blind eye to *Blumenthal v. United States*, 332 U.S. 539, 558 (1947), when it declined to follow the Sixth and Eighth Circuit's hub-and-spoke decisions. *See* Pet. 14-15 & n.9.

Unable to defend (and utterly declining to address) the conflicts with *three* of this Court's decisions, the OEMs (at 17-18) next pretend there is no conflict with the Sixth or Eighth Circuit because Gravity's claims would fail in any case under their hub-and-spoke standard. But the panel majority obviously disagreed; otherwise, it would not have gone so far as to hold the standard itself unlawful. *See id.* at 10a-11a. Moreover, while running away from the panel majority's flawed reasoning, the OEMs fail to reveal that the district court's analysis on which they now rely was expressly rejected by the panel majority because it wrongly applied a heightened § 2 "specific intent" standard to Gravity's § 1 claims. *Compare id.* at 8a (explaining that the district court disregarded the controlling § 1 intent standards and "did not separately examine the sufficiency of Gravity's [§§ 1 and 2] claims") *with* OEM Br. 17 (relying on district court's specific intent requirement that the OEM defendants' "minds had met *to maintain Microsoft's monopolies*") (quoting Pet. App. 54a) (emphasis added, internal quotation marks omitted).[1] Indeed, the panel majority agreed that Gravity had satisfied the applicable § 1 "intent" requirements. *See* Pet. App. 13a.[2]

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[1] The OEMs had persuaded the district court that Gravity's §§ 1 and 2 claims "coalesced" into a § 2 claim, Pet. App. 48a-51a, but the panel majority correctly rejected that theory out of hand, *see id.* at 8a; Pet. 10 n.5. The OEMs did not even defend this novel coalescing theory in the court of appeals, so it is especially ironic for them to lug it out now.

[2] As the panel majority correctly explained, "the 'combination or conspiracy' element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion. . . . The co-conspirators need not share the same motive or goal; it is sufficient to allege that the co-

In a variant of this erroneous specific intent theme, the OEMs claim (at 18) that each "spoke" must have "had reason to know that its actions were unlawful." But the OEMs identify no legal requirement – and there is none – that they had to "know" in advance how their actions (of which they most certainly were aware) might be evaluated under the antitrust laws.[3] In any case, the OEMs surely knew their exclusionary agreements with Microsoft – which kept Microsoft's middleware competitors, including Netscape, from their computers – were anticompetitive and thus could well be illegal under the Sherman Act. As the dissent concluded, "[r]egardless of whether any OEM desired the participation of other OEMs (and they conceivably might have), Gravity alleges that each OEM joined a conspiracy which it knew was, by its nature, broader than just itself and Microsoft." Pet. App. 34a.[4]

II. THE DECISION FLATLY CONTRAVENES THIS COURT'S NOTICE PLEADING PRECEDENT

The decision below also conflicts irreconcilably with the Court's recent and unanimous notice pleading pronouncement. "[U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case." *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992, 997 (2002). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 998.

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conspirators acquiesced in an illegal scheme." Pet. App. 13a (citing numerous cases) (internal quotation marks and alteration omitted).

[3] Although "Congress has . . . softened the impact of the common-law presumption [that ignorance of the law is no defense to criminal prosecution] by making specific intent to violate the law an element of certain federal criminal tax offenses," *Cheek v. United States*, 498 U.S. 192, 200 (1991), the OEMs can identify no such alteration with regard to civil liability under § 1 of the Sherman Act.

[4] The OEMs suggest this pleading-stage case is an inappropriate vehicle for review, but the hub-and-spoke standard is purely a question of law and would benefit little if any by further factual development.

The panel majority disregarded the conspiracy's combined power in the relevant *software* markets, fabricating instead a requirement that Gravity plead the OEM defendants' *computer* market shares, thus failing to take the complaint as pled. *See id.* (authorizing dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations") (internal quotation marks omitted). As explained further below, that requirement is wrong on its own terms. But, even if Gravity were required to meet that test at trial if relying on *circumstantial evidence* of anticompetitive effects in the relevant software markets, this "Court has made crystal clear ... that an evidentiary standard does not determine the adequacy of a complaint. It is inappropriate, therefore, to require plaintiffs to plead facts going to that evidentiary standard." Dissent, Pet. App. 36a (citation omitted); *see* Pet. 16-17.

Like the *McDonnell Douglas* test at issue in *Swierkiewicz*, the panel majority's market share requirement is a circumstantial *evidentiary* standard inapplicable at the pleading stage. A plaintiff need not "plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence ... is discovered." *Swierkiewicz*, 122 S. Ct. at 997. "[D]irect evidence of anticompetitive effects" renders "'elaborate market analysis'" unnecessary. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2002) (quoting *FTC v. Indiana. Fed'n of Dentists*, 476 U.S. 447, 461 (1986)) (finding defendant toy retailer with just 20% of U.S. retail market "was remarkably successful in causing the 10 major toy manufacturers to reduce output to ... warehouse clubs, [which] protected [defendant] from having to lower its prices to meet the clubs' price levels").

The OEMs (at 15) say only that "[d]iscovery certainly would not provide any" direct evidence, but that self-serving statement is at odds both with the very purpose of discovery and with *Swierkiewicz*. "Rule 8(a) establishes a pleading standard without regard to whether a claim will

succeed on the merits. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely *but that is not the test.*" *Swierkiewicz*, 122 S. Ct. at 999 (emphasis added, internal quotation marks omitted). The panel majority's annihilation of *Swierkiewicz* in the Fourth Circuit could not be more plain.

Further, the record – even at the pleading stage, where evidence is not required – already contains evidence that the OEM defendants' conduct caused actual anticompetitive effects in the relevant software markets. Microsoft itself thought these OEMs essential to its scheme, for it lured them with incentives and special benefits that were denied other large OEMs, such as IBM and Gateway, that "resisted Microsoft's efforts to enlist them." *Microsoft*, 84 F. Supp. 2d at 27 (¶ 64). The OEMs (at 14) pretend they were mere innocent victims of a monopolist, but the unsealed evidence from the government's case (where the OEMs' conduct was not directly at issue) tells a far different story of their vying with Microsoft to police their competitors' adherence to common restrictions that, in short order, shut Netscape and other middleware out of the market.[5] That scheme was fantastically successful. *See* 84 F. Supp. 2d at 69 (¶ 239) ("By January 1998, . . . of the sixty OEM sub-channels . . . , Navigator was being shipped through only four.").

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[5] Compaq, for example, was using Netscape internally and candidly noted that its agreement with Microsoft "raises questions of improper use of a monopoly position." C.A. App. 385, 389, 422. In 1998, a senior PB product manager believed it would be "ideal" to give all its laptop customers the option of Netscape, *id.* at 437-39, yet PB apparently agreed to preserve the standard Windows desktop without Netscape in exchange for royalty benefits, *id.* at 391. Compaq and Dell went along, though they knew such restrictions harmed both customers and product quality. *Id.* at 385. Dell further expressed "concern" to Microsoft about how well PB was observing restrictions on modification of the Window's boot-up sequence and the desktop, and asked how "[Microsoft] intends to police the Windows Experience" under the OEM agreements. *Id.* at 448-51.

Although beside the point here because Gravity was not required to plead a circumstantial case, it bears noting that the OEMs (at 11-12) wrongly fault Gravity's reliance on the power of the *conspiracy* to raise price and reduce output in the relevant software markets. Under black-letter law, it is entirely proper to hold Microsoft's co-conspirators liable for actions that Microsoft took in furtherance of the conspiracy.[6] "[A]fter all, the reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market." *Spectators' Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001).

The OEMs defendants (at 11) characterize Gravity's claims as "breathtaking," but it is their own theory of antitrust immunity that is fatally out of step. Far from being no different from other OEMs, it was these frontline partners – Microsoft's biggest distributors – who led the charge by first agreeing to Microsoft's scheme to exclude middleware, in the process extracting special benefits and incentives from Microsoft. This critical mass made it possible for Microsoft to accomplish its exclusionary goals. Rather than use whatever bargaining leverage they had with Microsoft to negotiate *lawful* terms that would not exclude competition in the software markets, Compaq, Dell, and PB each chose instead to obtain discounts and non-price benefits that their rival software distributors were denied, giving these OEMs a relative competitive advantage vis-à-vis their competitors. That action was, at the very least, a "material cause" of the massive consumer harm at issue in this case. *Zenith Radio Corp. v. Ha-*

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[6] *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940) ("[S]ales by any one of the respondents . . . bound all. For a conspiracy is a partnership in crime; and an overt act of one partner may be the act of all without any new agreement specifically directed to that act.") (internal quotation marks omitted); *Salinas v. United States*, 522 U.S. 52, 64 (1997) ("so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators").

zeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969). Under *Swierkiewicz*, Gravity is entitled to proceed to discovery on its claims, and this Court should grant review to assure lower court adherence to that important precedent.

III. THE DECISION CONFLICTS WITH CIRCUIT PRECEDENT APPLYING *ILLINOIS BRICK* AND UNDERMINES *ILLINOIS BRICK* ITSELF

This Court based the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), on the view that direct purchasers have more incentive than indirect purchasers to sue for an antitrust violation, thereby providing maximum antitrust deterrence. *See* Pet. 23-24. The decision below undermines this goal by giving the sole right to sue to a co-conspirator in that violation – thus providing about as much deterrence as would designating Enron executives the exclusive private attorneys general for enforcement of the securities laws. Denying co-conspirators the protection of *Illinois Brick*, on the other hand, "maximizes deterrence by giving the right to sue to the plaintiff with the most incentive to sue" – the direct purchaser from the conspiracy. Dissent, Pet. App. 43a.

As three circuits have held (and four others have suggested), this fundamental concern renders *Illinois Brick* and its progeny inapplicable to conspiracy claims, for those decisions "are themselves designed to improve deterrence." *Paper Sys., Inc. v. Nippon Paper Indus Co.*, 281 F.3d 629, 633 (7th Cir. 2002); *see* Pet. 21-22. Respondents completely ignore that deterrence rationale (because they have no answer for it) and instead claim that there is no conflict worthy of review because the circuit court decisions finding *Illinois Brick* inapplicable to conspiracies should be limited to the price-fixing context.

None of those decisions was so limited. Although Judge Easterbrook's opinion in *Paper Systems* noted, in reciting the facts, that the defendants had conspired "to reduce output and raise price," the court nowhere mentioned the term price-fixing or relied on any ease of determining damages, as Respondents' theory would have it. 281 F.3d

at 631. To the contrary, the court explained that, if "the amount of the overcharge . . . cannot be established . . . *by the conspirators' own agreement*[,] then it is necessary to determine the elasticities of supply and demand. But this prospect is present in every cartel case; it is not occasioned solely by the presence of intermediaries." *Id.* at 633 (emphasis added). Likewise, *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980), held *Illinois Brick* inapplicable to a multifaceted conspiracy not limited to pricing. Microsoft claims (at 6 n.1) that *Fontana* was decided solely on the basis of the plaintiff's competitor status, but that was simply "another reason" that the case did not "fit within the *Illinois Brick* mold." 617 F.2d at 481.[7] The Seventh Circuit has repeatedly relied on *Fontana* (its own precedent) as primary authority for holding *Illinois Brick* inapplicable to conspiracies, which would be impossible if Microsoft's reading were correct. *See Paper Sys.*, 281 F.3d at 632; *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 604 (7th Cir. 1997) (Posner, J.). These conflicts are patent and amply warrant this Court's review.

Respondents also wrongly portray *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), as suggesting that the indirect purchaser rule applies to all conspiracy claims (including those alleging price-fixing). Microsoft Br. 5-6; OEM Br. 21, 24. But no conspiracy claim was raised or even mentioned in *UtiliCorp* (or in any of the Court's *Illinois Brick* line of cases), and *UtiliCorp* actually supports Gravity's position here. In declining to carve out an indirect purchaser exception for consumers of public utilities, Justice Kennedy wrote for the Court that it might have held otherwise "[i]f we were convinced that indirect suits would secure [the vigorous enforcement of the antitrust laws] better in cases involving utilities." *UtiliCorp*, 497 U.S. at 214 (finding adequate incentive for utilities to sue to recover overcharges by their energy suppliers).

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[7] Microsoft's court of appeals brief (at 22 n.11) recognized that, in *Fontana*, "plaintiff was both a customer and a competitor."

Respondents can offer no reason why "the vigorous enforcement of the antitrust laws" (*id.*) is best entrusted exclusively to a co-conspirator, and there plainly is none. When this Court addressed coordination among firms in *Illinois Brick*, it expressly recognized control and cost-plus contract exceptions that are applicable because "market forces have been superseded." 431 U.S. at 736 n.16. That is precisely the case here, where the conspiracy "circumvent[ed]" normal "complex market interactions" between Microsoft and the OEM defendants. *Id.* at 736. Holding an antitrust conspiracy outside *Illinois Brick* is thus "compatible with *Hanover Shoe*, *Illinois Brick*, and *Utili-Corp*." *Paper Sys.*, 281 F.3d at 632-33. The panel majority's complete undermining of *Illinois Brick*'s foundation is yet another reason to grant review.[8]

Given the utter lack of deterrent value from placing the sole private antitrust enforcement right in a co-conspirator, the price-tracing and double-recovery concerns are simply inapplicable. *See id.* at 632 ("The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages."); *Brand Name Drugs*, 123 F.3d at 604 ("[A]ny indirect-purchaser defense would go by the board, since [plaintiffs] would then be direct purchasers from the conspirators."). In any event, neither concern applies here.

The OEM defendants (at 24) merely repeat the panel majority's unreasoned conclusion that *Illinois Brick*'s price-tracing concern is present, and Microsoft declines to join issue. But the sole point of that concern is to avoid having to allocate damages between the direct and in-

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[8] *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) ("Congress treated concerted behavior more strictly than unilateral behavior [because it] . . . deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.").

direct purchasers. In a conspiracy, however, there can be no such allocation because the conspirators are jointly and severally liable for all the damages they have caused and may not seek contribution from each other. *See* Pet. 25-26. There simply is no pass-on that needs to be determined. *See* Pet. 26-27. Respondents' failure even to attempt rebuttal of these arguments is further proof that the panel majority's decision is indefensible. *See* Dissent, Pet. App. 43a ("How much of its monopoly profits Microsoft retained is merely a matter of how the conspirators allocated the fruits of their alleged illegality, and is not directly relevant to Gravity.").

Microsoft (at 7) attempts to invoke the double-recovery concern because the OEM defendants, when Microsoft filed its brief, were members of some proposed classes before the district court. Since then, however, the district court has denied class certification, in large part because such "business customers . . . , through their own inaction, have evidenced a disinterest in their potential claims." *In re Microsoft Corp. Antitrust Litig.*, No. MDL 1332, 2003 WL 1878759, at *5 (D. Md. Apr. 14, 2003). That finding accords fully with the OEM defendants' statement here (at 23-24) that they "have thus far not elected to sue Microsoft."[9] That refusal to sue is part of the conspiracy. The Court should not allow Respondents to turn it into an antitrust liability shield. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 (9th Cir. 2003) ("indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation" by virtue of its co-conspirator status) (Kozinski, J.).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

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[9] Early in this case, counsel for Compaq candidly suggested that any class certification would cause the OEM defendants to "opt out and decide not to pursue any claims against Microsoft." C.A. App. 165-66.

Respectfully submitted,

R. STEPHEN BERRY
J. DANIEL LEFTWICH
GREGORY BARUCH
BERRY & LEFTWICH
1717 Pennsylvania Ave., N.W.
Suite 450
Washington, D.C. 20006
(202) 296-3020

NELSON ROACH
NIX, PATTERSON & ROACH
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
STEVEN F. BENZ
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

April 21, 2003